No. 96-1707

Supreme Court, U.S.
FILED
JUN 6 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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Respondents, City of Nederland and Zoning Board of Appeals of the City of Nederland, submit this Supplemental Brief in order to address issues presented by the Amicus Curiae Brief submitted by the Manufactured Housing Institute.

SUMMARY OF ARGUMENT

Displacing state law in traditional spheres of state authority, such as zoning, by application of the preemption doctrine is done only when it is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). Nothing in the legislative history of the National Manufactured Housing Construction & Safety Standards Act of 1974, § 604(d), 42 U.S.C. § 5403 (NMHCSSA) demonstrates an intent on the part of Congress to deprive the local government of their traditional zoning and police powers. According to Congress, the purpose of the NMHCSSA "is to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes." 42 U.S.C. § 5401.

The NMHCSSA precludes states from imposing construction and safety standards on manufactured homes which differ in any respect from standards developed by the Department of Housing and Urban Development (HUD). An additional indication of Congress' intent is demonstrated by the guidelines issued by HUD, the administrative entity which enforces the provisions of the Act. HUD's guideline on the preemptive reach of the NMHCSSA address local ordinances which restrict the placement of "manufactured homes" and deems them not to be preempted by the Federal Act, when all "manufactured homes" are treated the same.

Ordinance 259 is a zoning ordinance which restricts the placement of *all* manufactured homes to mobile home parks and mobile home subdivisions in order to protect property values; it does not set safety or construction standards. Since the NMHCSSA will only preempt state law if the law differs from standards that federal law has already

set, the Federal Act by its express terms does not preempt Ordinance 259.

The Fifth Circuit was correct in its analysis of the Commerce Clause. The Court found Ordinance 259 had, if any, only an incidental effect on commerce. Under this Court's precedent, in order to discriminate against interstate commerce a local or state regulation must treat in-state and out-of-state economic interests differently so as to benefit the in-state interest and burden the out-of-state interest. *Oregon Waste Systems Inc. v. Oregon Dep't Envtl. Quality*, 511 U.S. 93, 114 S. Ct. 1345, 1350, 128 L. Ed. 2d 13 (1994). The evidence demonstrated Ordinance 259 treats HUD-Code manufactured homes built in-state identically to those built out-of-state. While Petitioners, as well as Amici, argue the ordinance benefits an in-state interest (modular housing) and burdens an out-of-state interest (manufactured housing), the record fails to support this argument. Manufactured housing is built on a permanent chassis, but modular housing is not. Once the Court made the determination that Ordinance 259 had, if any, only an incidental effect on interstate commerce, the Court then applied the analysis found in *Pike v. Bruce Church*, 397 U.S. 137 (1970) to the facts in this case.

In order to apply the balancing test found in *Pike*, the Fifth Circuit looked at whether the alleged burden on interstate commerce was clearly excessive to the local interest served by the ordinance. The record below did not demonstrate a clear burden on interstate commerce, while the evidence clearly demonstrated the haphazard placement of manufactured housing within the City would have a negative impact on the property values of the area. Therefore, the Fifth Circuit correctly upheld the District Court's holding that Ordinance 259 does not violate the Dormant Commerce Clause.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD ORDINANCE 259 WAS NOT PREEMPTED BY THE NMHCSSA.

It is well settled the state's historic police powers should not be

superseded by federal laws unless that is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). In the areas traditionally regulated by the states through their police powers, this Court applies a presumption in favor of a narrow interpretation of an express preemption clause. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Congress' intent in determining the scope of a preemption statute is primarily discerned from the language of the preemption statute and statutory framework surrounding it, also relevant, however, is the structure and purpose of the statute as a whole, as revealed by the text. *Medtronic, Inc. v. Lohr*, 518 U.S. __, __, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996).

In order to make its intent clear, Congress may explicitly define the extent to which federal law will preempt state law. *Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S. Ct. 2518, 2523, 81 L. Ed. 2d 399 (1984). Within the NMHCSSA, Congress expressly defines the Act's preemptive reach. The Act provides no state shall have the authority to establish "any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal Manufactured Home Construction Safety Standard." 42 U.S.C. § 5403(d).

By including the express preemption clause in the Federal Act, Congress has demonstrated its intent for the Act to preempt at least some state law. Therefore, the issue in this case is not whether Congress intended for the Act to have any preemptive effect but the intended scope of preemption. It is not disputed the NMHCSSA precludes states and local governments from establishing safety and construction standards for HUD-Code manufactured homes different from those of the Federal Act. The Federal Act does not, however, indicate a federal intent to preempt a local government's traditional ability to zone. The Act itself is most instructive of legislative intent. Congress' express intent in passing the NMHCSSA was to "reduce the number of personal injuries and deaths and the amount of insurance costs and property

damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes." 42 U.S.C. § 5401.

Any lingering ambiguity about the scope of the Act is resolved by the HUD's analysis of the preemptive scope. HUD is vested with the primary responsibility for administering and enforcing the Federal Act. Exercising this delegated authority, HUD has issued internal guidelines interpreting and applying the Federal Act to determine its preemptive effect on state and local law. With respect to the type of ordinance at issue in the present case, HUD's interpretation of the Federal Act is unambiguous: such ordinances are not preempted. (Amici Brief App. A). HUD's guidelines state:

> Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such enforcement rests on the locality's right to determine proper land use. . . .
>
> A locality is not in conflict with the preemptive provisions of the Act if, without regard to construction standards, it treats all structures that meet the Federal definition of Manufactured Homes the same under local zoning laws.

Notice of Internal Guidance on Preemption, 62 Fed. Reg. 3456 (Jan. 23, 1997) (Amici Brief App. A page 5a-6a).

A manufactured home is defined by the Federal Act as:

> A structure, transportable in one or more sections, . . . which is built on a ***permanent chassis*** and designed to be used as a dwelling with or without a permanent foundation. . . .

42 U.S.C. § 5402(6). (Emphasis added)

City of Nederland's Ordinance 259 restricts the placement of manufactured homes and all other mobile homes to mobile home parks and subdivisions. Any manufactured home built with a permanent chassis may not be located outside these areas even if they meet stricter building standards. Despite Amici's unsupported statement to the contrary, the record below establishes the City of Nederland consistently and fairly enforced Ordinance 259. The City's enforcement of the ordinance is in line with HUD's internal guidelines. The City makes no exception for those HUD-Code homes which meet the local building code.

The Amici, however, argue modular housing is not subject to Ordinance 259 and such homes are manufactured homes as defined by the Act and, thus, Ordinance 259 treats manufactured homes which are built to HUD-Code standards different than manufactured homes which are not built to the federal standards. Manufactured homes, however, as defined by the Federal Act, must have a permanent chassis. Modular homes do not have a permanent chassis. The legislature in Title 42 U.S.C. § 5403(8) specifically excludes from coverage modular housing. Thus, modular housing does not meet the federal definition of manufactured homes as defined in 42 U.S.C. § 5402(6), and Ordinance 259's exclusion of modular housing does not indicate Ordinance 259 treats manufactured homes which comply with the federal standard differently than manufactured homes which do not comply with the federal standard.

The Amici argue the express preemption in the Federal Act was created purposely by Congress "to provide the uniformity requisite to nation-wide delivery of affordable, safe and high quality manufactured homes." Because the NMHCSSA preempts an area (safety) that historically has been regulated by the states through their police powers, this Court would historically construe such Act's preemption clause narrowly. *Medtronic*, 518 U.S. at __, 116 S. Ct. at 2250. The preemptive scope of the Federal Act is clearly limited to safety and construction standards and does not limit the local government's traditional zoning power to determine land usage. Ordinance 259 deals solely with land use and not with the manner in which manufactured homes are

constructed. The preemption doctrine is not applicable because the ordinance regulates where manufactured homes may be placed to maintain appearances in certain neighborhoods and to protect property values; it does not impose construction and safety standards on manufactured homes which differ from those required by federal law.

Amici further argue the Fifth Circuit's holding conflicts with the Eleventh Circuit's holding in *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988). The Eleventh Circuit affirmed a District Court's order holding a portion of the Defendant city's municipal code was preempted by the NMHSCCA. There, the city's code imposed a zoning regulation which excluded any home from the zone in question which did not meet the Southern Standard Building Code. The court in *Scurlock* recognized muncipalities could limit the areas in which HUD-Code homes may be placed but could not require the HUD-Code homes meet standards different than those established by the NMHSCCA. *Id.* at 1525. Unlike the municipal code in *Scurlock*, Ordinance 259 does not require HUD-Code manufactured homes meet a stricter standard in order to be located within the City limits. Ordinance 259 treats all manufactured homes the same and limits there placement in order to preserve property values. Thus, the Fifth Circuit's holding does not conflict with the holding of the Eleventh Circuit.

II. THE FIFTH CIRCUIT CORRECTLY HELD ORDINANCE 259 DID NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

Amici begin their discussion concerning the Dormant Commerce Clause claim with a policy argument and in support of their argument excerpted language from the *Final Report* of the National Commission on Manufactured Housing. (Amici Brief p. 15). Amici cite the Report for the proposition that in order to meet the goals of Congress, states and localities must revise their zoning laws to include manufactured housing where other single-family housing types are permitted. However, in the report a divided government Commission recommended sweeping changes in regulations governing the mobile home industry, including extensive warranties to ensure safer and more

durable homes. The Commission recognized manufactured housing still suffers from a "trailer park" image and is perceived as being inferior to site-built housing. In order to overcome this image, the Commission recommended increased warranties against structural problems. This warranty issue was one of the recommendations which divided the Commission members. The final report was approved 10-6, with all manufactured housing industry representatives voting against it.

The Court's Dormant Commerce Clause jurisprudence seeks to strike a balance between a national market principle and an understanding of federalism in which the Commerce Clause was never intended to strip the states of power to regulate local activity, even though it is incidentally related to interstate commerce. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-44, 80 S. Ct. 813, 4 L. Ed. 2d 852, (1960). This balance is reflected in the Court's two-tiered approach to analyzing challenged laws or actions. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). Where the state has been motivated by discriminatory purposes or the challenged action discriminates on its face, the action is subject to a "virtually per se rule of invalidity." *Wyoming v. Oklahoma*, 502 U.S. 437, 456, 112 S. Ct. 789, 112 L. Ed. 2d 1 (1992). The burden falls on the state to show it is pursuing some legitimate purpose which cannot be achieved with a nondiscriminatory alternative. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 92 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). On the other hand, the *Pike* balancing test states "[w]here a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970).

The analysis of the City of Nederland's Ordinance 259 starts with the selection of scrutiny: heightened scrutiny or *Pike* balancing. The Fifth Circuit held the city's land use ordinance which restricted the placement of manufactured homes within the city limits was facially neutral and not discriminatory in effect. (Petition App. B p. 17a). Amici argue the Ordinance 259, as applied, makes a distinction between HUD-

code homes and modular homes. Amici state "modular homes are made only in Texas." (Amici Brief page 16). Thus, their Dormant Commerce Clause argument is premised on the assumption that modular housing is the same as manufactured housing and is an in-state product. However, the record below does not support this assumption.

The only evidence on the issue of modular housing as an in-state product in the record below was an affidavit in which Petitioner's expert, Will Ehrle, stated he was *not aware* of any manufacturer outside of Texas that sells and ships modular homes to Texas. Additionally, he speculates that because modular homes must meet local building codes the construction and sale of modular housing is a local industry. This statement is not supported by the record below which established modular homes are required to meet the National Electrical Code and either the Uniform Building Code or the Standard Building Code. (Petition App. B p. 17a). Based on Mr. Ehrles's affidavit alone, Petitioners and now Amici argue Modular housing is an in-state product. As noted by the Fifth Circuit, it is clear Mr. Ehrle's testimony does not foreclose the possibility that modular housing is constructed out-of-state and installed in-state. (Petition App. B p. 17a). Additionally, the Fifth Circuit noted the Texas statute which regulates modular housing specifically contemplates the interstate sale and installation of modular homes. Tex. Rev. Civ. Stat. Ann. Art. 5221f-1 (Vernon Supp. 1997) (Petition App. B p. 17a). Therefore, Amici's argument that as a result of "the City's application of its ordinance, out-of-state manufacturers of HUD Code manufactured housing, who ship their homes to Texas on a regular basis, have lost a portion of their market, while Texas manufacturers of modular/industrialized homes have been protected . . ." is fatally flawed. Both the Fifth Circuit and the District Court held the record below did not support the contention that modular housing is an in-state product. (Petition App. B p. 17a, App. D p. 45a).

This Court has defined "discrimination" in the Dormant Commerce Clause context to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems Inc. v. Oregon Dep't Envtl. Quality,*

511 U.S. 93, 98 (1994). In order to discriminate against interstate commerce, not only must the local ordinance in question treat an out-of-state industry different then an in-state industry, but such treatment must result in a benefit to the in-state industry and place a burden on the out-of-state industry. Petitioner and Amici argue the record below presented evidence sales of manufactured homes are harmed by Ordinance 259's restriction of these homes to mobile home parks and subdivisions. However, both the District Court and Fifth Circuit held the record below failed to demonstrate how the supposedly in-state industry of modular housing was benefited by the ordinance. (Petition App. B p. 18a, App. D p. 45a). The Fifth Circuit stated "plaintiff's own evidence demonstrates that the markets for modular homes and for HUD-code manufactured homes, though overlapping, are basically distinct. . . . There are two markets at work, and plaintiffs have not presented evidence demonstrating that restriction on HUD-code manufactured homes will result in a corresponding increase in sales of modular homes." (Petition App. B p. 18a). Thus, the Court supported the District Courts holding that Ordinance 259 had if any, only an incidental effect on interstate commerce and was therefore subject to the *Pike* analysis.

Amici argue the Fifth Circuit erred in upholding the District Court's application of the *Pike* analysis because the court failed to require the City to demonstrate a less burdensome alternative. (Amici Brief p. 17). However, the *Pike* balancing test does not require such a showing. Only if the challenged activity has been motivated by discriminatory purposes or the challenged action discriminates on its face or in its practical effect does the burden fall on the state to show it is pursuing some legitimate purpose which cannot be achieved with a nondiscriminatory alternative. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Where, as in the present case, the challenged action "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). The local benefit is significant:

preserving the value of the largest investment most citizens of this country ever make — their home.

Amici cite an unreported District Court case, *Georgia Manufactured Housing Association v. Spalding County, Ga.*, No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996), *reh'g denied*, (N.D. Ga., unreported, Feb. 6, 1997), in which they assert the court applied the *Pike* balancing test to find an ordinance violated the Dormant Commerce Clause due to its requirement that HUD-code homes have pitch roofs. Amici quote the court in *Spalding*, as stating "when a challenged regulation imposes *substantial* economic burdens on both intrastate and interstate commerce . . . , the local benefits . . . must be great. . . ." (emphasis added). It appears clear from the quoted language the facts in *Spalding* were significantly different then the facts in the present case. The evidence in this case does not demonstrate the challenged regulation resulted in a substantial burden on commerce. Additionally, the local interest involved here, protection of property values, is integral to the protection of the general welfare. The Fifth Circuit found Petitioners failed to produce evidence sufficient to create a genuine issue of material fact "with respect to whether the burden on interstate commerce clearly exceeds the local benefits." (Petition App. B p. 19a). Thus, the Court correctly upheld the District Court's granting of summary judgment for Respondents on Petitioner's Dormant Commerce Clause claim.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Respondents' Brief in Opposition, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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